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SOAH DOCKET NO. 473-21-0538
DOCKET NO. 51415

APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE
ELECTRIC POWER COMPANY FOR § OF
AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

**SOUTHWESTERN ELECTRIC POWER COMPANY'S RESPONSE TO TEXAS
INDUSTRIAL ENERGY CONSUMERS' MOTION TO COMPEL**

Southwestern Electric Power Company (SWEPCO) requests the Administrative Law Judges (ALJs) deny Texas Industrial Energy Consumers' (TIEC) motion to compel responses to TIEC Requests for Information (RFIs) Nos. 13-2, 13-4, and 13-10 because the RFIs seek information that is not relevant, or is unduly burdensome, and not calculated to lead to the discovery of admissible evidence in this proceeding.¹

I. GENERAL RESPONSE TO MOTION TO COMPEL

While the scope of discovery in Commission proceedings is broad, RFIs must show a reasonable expectation of obtaining information that will aid in the resolution of the matters at issue in a case.² In this case, a dispute has arisen concerning the inclusion of retail behind-the-meter generation (BTMG) in SWEPCO's monthly network load and the corresponding increase in SWEPCO's load ratio share for purposes of the Southwest Power Pool's (SPP) allocation of transmission costs to its members. TIEC witness Jeffrey Pollock has opined that inclusion of BTMG in SWEPCO's monthly load reporting is not required by SPP's Open Access Transmission Tariff (OATT) and, therefore, SWEPCO's inclusion of this load was a voluntary choice of the Company. In rebuttal testimony, Charles J. Locke, Director of Transmission Policy and Rates at

¹ Pursuant to SOAH Order No. 2, this response is timely filed.

² *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding).

SPP, explained SPP’s understanding of the SPP OATT, and that consistent with Federal Energy Regulatory Commission (FERC) precedent, inclusion of BTMG in SWEPCO’s monthly load reporting is required under the OATT.³ Mr. Pollock’s contention to the contrary is the basis of his recommendation for the disallowance of \$5.7 million of SWEPCO’s test year transmission charges from SPP.⁴ What Mr. Pollock ultimately presents is a legal question about what is required under the SPP OATT, a FERC-approved tariff. Whether the SPP OATT is susceptible to TIEC’s competing interpretation is a legal question properly raised before the FERC.⁵ The information sought by TIEC in the RFIs at issue will not assist in the legal interpretation of the SPP OATT and has no bearing on the resolution of facts that are “of consequence in determining [this] action.”

Contrary to TIEC’s motion to compel, not only is the proper interpretation and construction of the SPP OATT a legal question but so is the question of whether the tariff is ambiguous, one that should be raised before the FERC.⁶ And in any event, the use of extrinsic evidence may not be used to create an ambiguity in the tariff; more importantly, extrinsic evidence would not, as an aid of construction, include evidence of what others thought or believed to be the interpretation of the text.⁷ It is thus quite a stretch to suggest that individual SPP members’ beliefs or practices

³ Rebuttal Testimony of Charles J. Locke at 5-8.

⁴ Direct Testimony and Exhibits of Jeffry Pollock at 25.

⁵ See *Roberts Exp., Inc. v. Expert Transp., Inc.*, 842 S.W.2d 766, 771 (Tex. App.—Dallas 1992, no writ) (“Like statutory interpretations, tariff interpretations involve mainly questions of law.”).

⁶ Statutory construction is a legal question reviewed *de novo* and where there is no ambiguity, extrinsic evidence is not consulted. See *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 130 (Tex. 2018); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (“Only when those words are ambiguous do we ‘resort to rules of construction or extrinsic aids.’”(quoting *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex.2007)). Thus, what other SPP members do or say with respect to the tariff does not actually establish an interpretation or assist in resolving an ambiguity. *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 133 (Tex. 2018) (“And we will not rely on such extrinsic aids to create an ambiguity.”).

⁷ As acknowledged at n.16 of TIEC’s motion to compel, statutory construction aids would include information such as legislative history, the circumstances surrounding the enactment of legislation, and the consequences of a particular construction. The opinions of survey respondents is not extrinsic evidence that could be relied upon to aid in construction of the text.

constitute the type of extrinsic aid that could be relied upon to support the construction of the SPP OATT. But to be clear, the requested survey responses do not relate to SPP's interpretation or understanding of *the tariff* but instead simply aided SPP in understanding the actions of its members to assist SPP in development of the educational materials disseminated to instruct members on the proper implementation of the tariff.

SWEPCO's decision to comply with the SPP's instruction and express directives and whether that decision was ultimately a reasonable one is not contingent upon resolution of the proper legal interpretation of the SPP OATT and is also not dependent on the decisions of other members of SPP. It appears TIEC is attempting to transform the factual issue of SWEPCO's reasonableness as compared to the behavior of others into a basis to support an interpretation of the SPP OATT in line with its own.

II. RESPONSE TO MOTION TO COMPEL AS TO SPECIFIC OBJECTIONS

Request for Information

13-2 Please provide all responses to the 2017 and 2019 surveys identified on page 22 of Mr. Locke's testimony.

Objection

SWEPCO objected to this request because it seeks information that is irrelevant and outside the scope of permissible discovery.⁸ Information is relevant to the subject matter of a proceeding if the information "has any tendency to make a fact more or less probable than it would be" without the information and that "fact is of consequence in determining the action."⁹ Therefore, discovery

⁸ See Tex. R. Civ. Proc. 192.3(a); 16 TAC § 22.141 (noting scope of discovery to the subject matter in the proceeding); *In re Master Flo Valve Inc.*, 485 S.W.3d 207, 213 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("Discovery requests must be limited to the relevant time, place and subject matter.").

⁹ Tex. R. Evid. 401.

requests must be reasonably tailored to include only relevant matters. TIEC argues these responses are relevant because: they will reveal the practices and positions of other SPP members; the information is probative of whether SWEPCO's decision to include retail BTMG when reporting network load was reasonable; and the information is relevant to the proper interpretation of the SPP OATT. TIEC also states the responses are probative to the accuracy of Mr. Locke's assertions regarding the responses.

TIEC's arguments do not establish the relevance of this information. The information TIEC hopes to obtain is unrelated to the determination of the requests for relief and issues for resolution in this case. The practices and positions of other network customers however revealed in the survey responses is not relevant to the resolution of the issue surrounding SPP transmission charges in this case and is not probative of the reasonableness of SWEPCO's compliance with SPP's directives regarding load reporting requirements. In particular, the survey responses identifying what other network customers may have thought about the load reporting requirements, and what any member may have stated in response to these surveys, do not bear on SWEPCO's understanding of SPP's directives. Nor could these survey responses clarify or dispute the basis for SWEPCO's SPP OATT related transmission charges. Additionally, in his testimony, Mr. Locke does not dispute that certain network customers were not reporting retail BTMG in their network load but instead acknowledges that SPP became aware that there were members not complying with the network load reporting requirements.¹⁰ As Mr. Locke explains, the 2017 survey was intended to aid SPP in understanding the load reporting practices of members, and the purpose of the 2019 survey was to gauge stakeholder interest in changes to the existing network

¹⁰ Rebuttal Testimony of Charles J. Locke at 22-23.

load reporting requirements.¹¹ At most, these survey responses could only tend to show the considerations and basis for SPP staff's development of a future proposal for stakeholders to enable SPP to seek FERC-approval of exceptions to the general current policy.¹² As such, these survey responses are not relevant to the issue of SPP OATT transmission charges in this case. The request is not reasonably calculated to lead to the discovery of admissible evidence.¹³

Request for Information

13-4 Please provide all SPP documents relating to or discussing the educational information referenced in the preceding RFI.¹⁴

Objection

SWEPCO objected to this request because it seeks information that is irrelevant, outside the scope of permissible discovery, and will not aid in the resolution of matters in this case.¹⁵ SWEPCO also objected because responding to this request is unduly burdensome—such that the burden and expense undertaken to respond will far exceed the likely benefits associated with the information provided, especially considering the related information already provided.¹⁶ TIEC acknowledges that SWEPCO provided information responsive to RFI 13-3, which requested the educational information SPP provided its stakeholders.

¹¹ *Id.* at 21-22.

¹² *Id.* at 10-11.

¹³ Tex. R. Civ. Proc. 192.3(a).

¹⁴ TIEC Request 13-3 states: Referring to page 23, lines 2-5 of Mr. Locke's testimony, please provide all such "educational information" that SPP provided to its stakeholders.

¹⁵ *See supra* at 2 (providing standard for relevance).

¹⁶ *See, e.g., In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (explaining that courts are explicitly encouraged to limit discovery "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."); *see also In re State Farm Lloyds*, 520 S.W.3d 595, 605 (Tex. 2017) (discussing proportionality limitations of Rule 192.4).

However, the information requested in 13-4 covers “all SPP documents relating to or discussing” the documents it has already provided in response to 13-3. SWEPCO understands and TIEC confirms that this request seeks not only drafts of the materials that have been provided and materials and communications related to the development of those materials but any and all communications to any members both before and after these materials were disseminated. Not only are the drafts and materials related to development and preparation of the education materials cumulative and duplicative, the draft materials are not relevant because that information was not provided to SPP members. To a similar extent, documentation of the communications about those materials is also irrelevant to SWEPCO’s request for relief in this proceeding. TIEC asserts that the communications about the materials will “shed light on the practices and positions” of other network customers and that the drafts are “relevant to the issue of the interpretation of the SPP OATT.” But again the practices and beliefs of network customers, and therefore communications about those practices and beliefs, does not bear on whether it was reasonable for SWEPCO to “change” how it reported its load to comply with the SPP OATT. And the legal question of the proper interpretation of the SPP OATT is not in any way clarified or resolved by the drafts related to development and preparation of the educational materials or any communications respecting these materials. The information sought in this request is not intended to aid in the resolution of issues in this case. Accordingly, these requests are not reasonably calculated to lead to the discovery of admissible evidence.¹⁷

Request for Information

13-10 Identify all other SPP network customers that have load served by retail BTM generation but have not reported it as part of monthly network load in the past 5 years.

¹⁷ Tex. R. Civ. Proc. 192.3(a).

Objection

SWEPCO objected to this requests because it seeks information that is irrelevant, outside the scope of permissible discovery, and will not aid in the resolution of matters in this case. TIEC characterizes SWEPCO's decision to comply with the SPP OATT reporting requirements, as directed by SPP, as an abrupt change and again seeks to obtain information related to the reporting practices of other SPP network customers. As SWEPCO has explained, the contested issue of whether the SPP OATT requires BTMG to be included in the calculation of network load is ultimately a legal matter to be addressed by FERC. The identities and information about the practices of other network customers and whether their practices changed in connection with the educational materials SPP provided will not lead to information concerning the legal interpretation of the SPP OATT. Notwithstanding the parties' conflicting interpretations of the tariff, resolution of that legal question is not necessary to address the issues central to SWEPCO's request for relief in this base rate case. Whether there are SPP network customers that have load served by retail BTMG that they have not reported has no bearing on whether SWEPCO has followed the directives of SPP consistent with FERC precedent and policy and reported its load in compliance with the SPP OATT. The compliance or non-compliance of other network members does not reveal anything probative to the issues in this case.

Additionally, whether SPP is aware of other SPP network customers who have load served by retail BTMG and have not reported it also has no bearing on whether SWEPCO has followed the directives of SPP consistent with FERC precedent and policy and reported its load in compliance with the SPP OATT. Thus, whether other members do or do not correctly report their network load is ultimately irrelevant to both SWEPCO's request in this case *and* to the asserted legal question of what the SPP OATT requires. The information requested is not relevant because

the information sought will not aid in the resolution of the matters of this case. This request is therefore not reasonably calculated to lead to the discovery of admissible evidence in this proceeding.

III. CONCLUSION

For the foregoing reasons, SWEPCO respectfully requests that its objections to TIEC's Thirteenth Set of RFIs be sustained and that TIEC's motion to compel be denied. SWEPCO further requests any other relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on May 14, 2021, in accordance with the Second Order Suspending Rules issued in Project No. 50664 and Order No. 1 in this matter.


Stephanie Green